IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1609

TERRY T. TORRES,

Appellant,

—v.—

COMMONWEALTH OF PUERTO RICO,

Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16(4) of the Rules of this Court, appellant files this brief in opposition to appellee's Motion to Dismiss or Affirm.

The Motion to Dismiss or Affirm fully illustrates and supports appellant's contention that the issues presented are indeed substantial. Moreover, contrary to appellee's argument, appellant properly raised below the subsidiary issue of denial of due process by the Puerto Rico Supreme Court.

1. Appellee's Motion Fully Demonstrates the Substantiality of the Federal Issues Presented.

Appellee does not dispute that Public Law No. 22 provides blanket authorization for police to "inspect the luggage, packages, bundles and bags of passengers" entering Puerto Rico from the United States, or that it empowers police to "detain, question and search those persons whom the police have ground to suspect of illegally carrying firearms, explosives, narcotic substances . . . stimulants or similar substances." (Public Law No. 22 is set out in full at Appendix F of the Jurisdictional Statement.) Similarly, appellee does not dispute the interpretation of the Supreme Court of Puerto Rico that Public Law 22 authorizes "indiscriminate" warrantless searches, "without reasonable

grounds" of persons as well as property, "for the purpose of instituting criminal prosecutions." (Jurisdictional Statement Appendix A at pp. 3, 22, 13.)

Appellee also concedes that the boundary between the United States and Puerto Rico "clearly does not reach the category of an international border." (Motion to Dismiss or Affirm at 17.) Routine customs searches at international borders have, of course, been upheld, Almeida-Sanchez v. United States, 413 U.S. 266 (1973), although unregulated police border searches for the sole purpose of criminal prosecution have not been specifically approved by this Court. Appellee assumes that the search in question would be constitutional at an international border and it argues that Puerto Rico should be considered an "intermediate border" (Motion at 23-24) at which similar warrantless searches should be allowed. Moreover, it argues by implication that the Commonwealth of Puerto Rico has the unilateral power to create such an "intermediate border," without regard for the Congress or Executive Branch of the United States. It is, to say the least, a startling proposition.

Appellee's alternative assertion that the search below was "administrative" ignores the clearly stated purpose and effect of Public Law 22 and the Puerto Rico Supreme Court's authoritative interpretation of that statute. See, Jurisdictional Statement at 13-15.

In any event, however, this Court has only this term again sustained the warrant requirement in administrative searches in Marshall v. Barlow's, Inc., ___ U.S. ___, 56 L.Ed.2d 305 (No. 76-1143, May 23, 1978). Appellee's attempt to depart from that requirement raises a substantial federal question.

Appellee's attempt to justify warrantless searches because of "serious problems that threaten . . . internal security"[1] similarly departs from the essential Fourth Amendment premise that the seriousness of the crime or threat does not justify abrogation of the warrant requirement. See, Mincey v. Arizona, ___ U.S. ___, 57 L.Ed.2d 290 (No. 77-5353, June 21, 1978).

Finally, appellee ignores altogether the effect of Public Law 22 on the right to travel. In Califano v. Torres, ___ U.S. ___, 55 L.Ed.2d 65 (per curiam)(Feb. 27, 1978), the Court considered a challenge to a statutory exclusion of residents of Puerto Rico from certain Social Security Income benefits. The petitioner (no relation to appellant) had lost benefits because he moved from Connecticut to Puerto Rico. Although upholding the exclusion, this Court "assumed" that the right to travel between the United States and Puerto Rico is no different from the right to travel among the several states:

1/ Motion at 37.

The constitutional right of interstate travel is virtually unqualified. United States v. Guest, 383 U.S. 745, 757-758, 16 L.Ed.2d 239, 86 S.Ct. 1170; Griffin v. Breckenridge, 403 U.S. 88, 105-106, 29 L.Ed.2d 338, 91 S.Ct. 1790. By contrast the "right" of international travel has been considered to be no more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment. Kent v. Dulles, 357 U.S. 116, 125, 2 L.Ed.2d 1204, 78 S.Ct. 1113; Aptheker v. Secretary of State, 378 U.S. 500, 505-506, 12 L.Ed.2d 992, 84 S.Ct. 1659. As such, this "right," the Court has held, can be regulated within the bounds of due process. Zemel v. Rusk, 381 U.S. 1, 14 L.Ed.2d. 179, 85 S.Ct. 1271. For purposes of this opinion we may assume that there is a virtually unqualified constitutional right to travel between Puerto Rico and any of the 50 States of the Union.

> Califano v. Torres, supra, 55 L.Ed.2d at 69, fn. 6 (Emphasis added).

Although it moves to affirm, appellee does not, in the body of its argument, even argue that the federal Fourth Amendment questions are not substantial. (Motion at 16-39.) Appellee's final call for "the exercise of

the creativity of judges" and for rejection of "the conceptual prison of stare decisis"[2/] serves only to illustrate the substantiality of the federal questions presented.

2. The Procedures Imposed on the Puerto Rico Supreme Court by its Constitution Raise a Substantial Federal Question, One Which Was Properly Raised in the Puerto Rico Supreme Court.

Although a majority of the seven justices who heard the case believed Public Law No. 22 to be unconstitutional, appellant's conviction was nonetheless affirmed because the Puerto Rico Constitution requires the vote of 5 of the 8 appointed members before a law may be declared unconstitutional. Appellee argues that this issue was not raised below because appellant's Motion to the Puerto Rico Supreme Court for reconsideration was not timely. (Motion to Dismiss or Affirm at 8; the motion for reconsideration is reproduced at Appendix A of the Motion to Dismiss or Affirm) Further, it argues that, in any case, a petition for rehearing does not raise the issue in the Court below, unless the petition has been granted. Id. at 9.

It is beyond dispute, however,

2/ Motion at 38-39, quoting from Judge Diaz Cruz below.

that appellant could not have raised the issue before the judgment of the Puerto Rico Supreme Court had been rendered. He had no idea who would participate or what the vote would be. Nor is it disputed that the Puerto Rico Supreme Court had jurisdiction to reconsider the matter when appellant's untimely petition was filed. Rule 45(d) of the Rules of the Puerto Rico Supreme Court (quoted in the Motion at 7) expressly provides for consideration of untimely petitions for reconsideration so long as "execution of the mandate" is not adversely affected. Since the Puerto Rico Supreme Court had already stayed the mandate pending appeal to this Court, the mandate could not have been adversely affected by that Court's reconsideration.

The Puerto Rico Supreme Court had the opportunity to consider the issue. It chose not to. The cases cited by appellant all deal with federal issues which could have been presented to the lower court at an earlier stage, but were presented for the first time on petition for rehearing. Since appellant could not have presented this issue prior to judgment and since he did so after judgment, he raised the issue in sufficient time to meet the requirements of Rule 16(b). Indeed, in Ohio ex. rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74, 79 (1930), the continuing validity of which is called into question by this part of the appeal, the issue was, of course, raised for the first time after judgment, and it was fully considered on the merits by this Court. See, Great Northern R.

Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 366-7 (1932); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 677-8 (1930).

Appellee's citation of Campbell v. Supreme Court of Florida, 428 F.2d 449 (5th Cir. 1970) (summary calendar), is of no help on the merits. Campbell sought relief from a unanimous ruling against him, claiming Florida procedure had not been followed. Here, the majority favored appellant's position, but entered judgment against him because of the challenged state constitutional provision. This bizarre result raises a substantial federal question.

CONCLUSION

Summary reversal of the result below would be fully consistent with the Fourth Amendment. Any other result would be such a departure from established precedent as to warrant plenary consideration. For the aforementioned reasons and those set forth in the Jurisdictional Statement, the Court should note probable jurisdiction and either vacate the opinion below and remand for reversal of the conviction or set the case for plenary consideration of the substantial federal question.

Respectfully submitted,

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